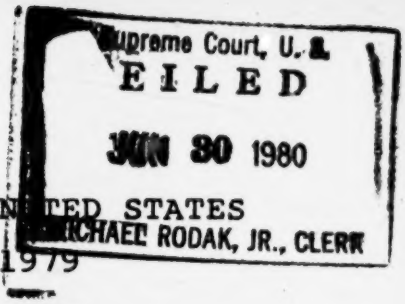

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79- 79-2075

EDDIE WISE,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

EDDIE WISE,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioner, EDDIE WISE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division One, entered on March 3, 1980, in the case of The People of the State of California v. Eddie Wise, 2 Crim. No. 35275. The California Supreme Court denied a petition for hearing in this matter on May 2, 1980, and left standing the judgment of the Superior Court of Los Angeles County convicting petitioner of a

violation of the California Health and Safety Code section 11377 (possession of phencyclidine) and sentencing him to the California Youth Authority for the maximum period of confinement.

OPINION BELOW

A copy of the opinion of the Court of Appeal is reproduced as Appendix A, attached to the instant petition. A copy of the order indicating that the petition for hearing in this case was denied by the California Supreme Court is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3). The order of the Court of Appeal became final on May 2, 1980, when the Supreme Court of the State of California denied petitioner's petition for hearing. (Cal. Rules of Court, rules 25, 28.)

QUESTIONS PRESENTED

1. If the police lack specific and articulable facts connecting a citizen to criminal activity, may they detain that

person if he exercises his constitutional right to be free from a threatened unwarranted detention?

2. Can avoidance of the police who do not have sufficient cause to detain a suspect form the basis for probable cause to detain?

3. May the police in an indiscriminate dragnet fashion, drive a police vehicle at a group of Blacks who exhibit no manifestations of criminal behavior in the hope that some might run away to avoid the threatened illegal detention, and then may the police base that detention on the citizen's attempt to avoid the illegal detention?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In an information filed in the Superior Court of Los Angeles County, it was alleged that petitioner violated California Health and Safety Code section 11377, possession of a controlled substance, phencyclidine (CT 37).[1/] After petitioner's motion to suppress evidence pursuant to California Penal Code section 1538.5 was denied, he pleaded guilty (CT 40). Petitioner was then sentenced to the California Youth Authority for the maximum term of confinement (CT 47-48).

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1. "CT" refers to the pages of the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

Petitioner appealed his judgment of conviction to the California Court of Appeal, Second Appellate District, Division One. Petitioner alleged on appeal: (1) That he was unconstitutionally detained and that all evidence seized during that illegal detention should have been suppressed, and (2) that the warrantless search of his closed container, an ordinary bottle, violated petitioner's Fourth Amendment right to privacy and protection from unreasonable searches.

STATEMENT OF FACTS

The Preliminary Hearing[2]

Prosecution Case

On November 14, 1978, at approximately 9 p.m., Officers Pytel and Holtz went to a parking lot at 102nd and Grape Streets to investigate complaints from anonymous, untested informers concerning previous

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2. The Penal Code section 1538.5 suppression hearing in the Superior Court was submitted upon the preliminary hearing transcript as contained in the Clerk's Transcript (CT 26).

narcotics activity at that location.[3] In conjunction with other officers who were to drive a police car into the parking lot to detain or scatter any citizens who might be present, Pytel and Holtz stationed themselves on foot behind a building north of the lot (CT 4-6). Pytel then observed a group of "male Negroes and a female Negro . . . standing in the parking lot" (CT 6). Pytel and Holtz observed no manifestations of criminal behavior; the group was merely standing and talking, no objects passed hands and no one appeared to be under the influence of drugs. As the police car drove toward the group, five or six people in the group, including petitioner, ran;[4] Pytel and Holtz ordered

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3. The anonymous informants did not state that drug activity was taking place that night, did not give a description of any persons involved in those prior transactions, and did not indicate the time of day of the previous narcotics activity.

4. Those members of the group who chose not to exercise their constitutional right to avoid illegal police detentions were also detained, questioned, and had Field-Identification Cards completed (CT 11-13, 16).

petitioner to halt and raise his hands. As petitioner complied with the police command, he "almost instantly" dropped a bottle to his feet.[5] During petitioner's detention the officers opened the bottle and determined that it contained PCP (CT 6-7, 12, 16-19). Petitioner was then arrested (CT 7, 16).

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5. The prosecution presented no evidence that the officers thought that petitioner abandoned or attempted to conceal the bottle. In fact, Pytel testified that petitioner did not attempt to throw or toss the bottle away, but rather merely "dropped the bottle down to his side" when they ordered him to halt and raise his hands (CT 10, 12).

REASONS FOR GRANTING THE WRIT

I

ONE'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO AVOID AN ILLEGAL POLICE SEIZURE CANNOT BE USED AGAINST HIM TO FORMULATE SUFFICIENT CAUSE TO DETAIN FOR QUESTIONING

This Court has in other contexts consistently held that one cannot be punished for the act of invoking a constitutional right.[6] However, in the instant case, petitioner was punished for exercising his Fourth Amendment right to be free from an unwarranted seizure by the police; the Court of Appeal held that petitioner's avoidance of the police permitted the officers to seize and detain him (Appen. A, p. 11).[7] As the California Supreme Court

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6. See v. Seattle (1967) 387 U.S. 541; Camara v. Municipal Court (1967) 387 U.S. 523; Albertson v. SACB (1965) 382 U.S. 70; Marchetti v. United States (1968) 390 U.S. 39; Grosso v. United States (1968) 390 U.S. 62; Haynes v. United States (1968) 390 U.S. 85; Leary v. United States (1969) 395 U.S. 6; Sherbert v. Verner (1963) 374 U.S. 398; and Speiser v. Randall (1958) 357 U.S. 513.

7. It is clear that even under Justice Stewart's recent definition of "seizure" in [fn. cont'd]

so cogently noted in People v. Bower (1979) 24 Cal.3d 638, 649:

> "If the right to be free from unjustified detentions is lost merely by seeking to avoid such encounters, then the right is meaningless; it would exist only to the extent it was not exercised. Such a conclusion is unacceptable."

However, this Court has never specifically affirmed the constitutional right to avoid or resist an unlawful detention. As Justice Douglas noted in his dissenting opinion in Wainwright v. Louisiana (1968) 392 U.S. 598, "at least prior to the ill-starred case of Terry v. Ohio, a citizen had the right to offer some resistence to an unconstitutional 'seizure' or 'search.' Must he now stand quietly and supinely while officers 'pat him down,' whirl him

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United States v. Mendenhall (1980) ___ U.S. ___, petitioner was seized since the officers' ordering him to halt and raise his hands was a show of authority through "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Furthermore, under the circumstances "a reasonable person would have believed that he was not free to leave." (Id., ___ U.S. ___; 48 U.S.L.Wk. 4575, 4578.)

around, and throw him in the wagon?"[8] Unfortunately, conflicting language and holdings in this Court's opinions, as well as inconsistent opinions in the Federal District courts, render it unclear whether a citizen may be detained for exercising his right to avoid illegal detentions. A hearing by this Court is therefore necessary to give guidance to the lower courts by resolving the current ambiguous and conflicting state of the law.

In the instant case, Officers Pytel and Holtz, prior to petitioner's attempt to avoid the police contact, lacked sufficient specific and articulable facts upon which to predicate petitioner's detention.[9]

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8. The court in Government of the Virgin Islands v. Duvergee (3rd Cir. 1972) 456 F.2d 1271, 1273, noted that the right to avoid an illegal arrest as formulated in Bad Elk v. United States (1900) 177 U.S. 529, 534-535 and United States v. DiRe (1948) 332 U.S. 581, 594 "may now be questionable in view of Terry v. Ohio [citation]."

9. The Court of Appeal merely held that after petitioner ran, the officers had sufficient cause to detain him. Respondent [fn. cont'd]

First, the anonymous, untested informers' tip that prior narcotics transactions had occurred in the parking lot was not sufficiently detailed nor reliable to support a detention. (Adams v. Williams (1972) 407 U.S. 143, 146-147; Aquilar v. Texas (1964) 378 U.S. 108; Spinelli v. United States (1969) 393 U.S. 410.) Furthermore, the mere presence of petitioner in an area of prior narcotics transactions was not suffcient to justify his detention. (Sibron v. State of New York (1968) 392 U.S. 40, 62-63; Brown v. Texas (1979) ___ U.S. ___, 61 L.Ed.2d 357; United States v. Nichols (8th Cir. 1971) 448 F.2d 622, 624.) The officers here had no information that a crime was being or was about to be committed, had no description of any suspects, and saw no actions by any of the members of the group which manifested possible criminal conduct. Even so, the police decided, and did, detain and question the members of the group. The police "dragnet" was

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has never contested either at trial or on appeal, that prior to the attempt to avoid police detention, that there was sufficient cause for a detention.

predicated upon a mere hunch that some of the members of the peacefully assembled group who were standing in the parking lot next to their residence might be involved in criminal behavior. Even after the police vehicle was driven toward the group, the only additional fact was the attempt of six persons to avoid the unwarranted police contact.[10/]

In United States v. DiRe, supra, 332 U.S. at 594, this Court stated that "[o]ne has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistence in proper cases." The right to avoid illegal police detentions short of arrests was recognized in Justices Harlan's and White's concurring opinions in Terry v. Ohio (1968) 392 U.S. 1. Justice Harlan stated that "ordinarily

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10. Since petitioner dropped the bottle in response to the illegal detention and the order to halt and raise his hands, the police could not predicate their search on an abandonment theory. (United States v. Newman (10th Cir. 1974) 490 F.2d 993, 995; Fletcher v. Wainwright (5th Cir. 1968) 399 F.2d 62; Wong Sun v. United States (1963) 371 U.S. 471; Badillo v. Superior Court (1956) 46 Cal.2d 269, 273.)

the person addressed has an equal right to ignore his interrogator and walk away," and Justice White concluded that "[a]bsent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way." (Id., at 32-34.) Furthermore, in Wright v. Georgia (1963) 373 U.S. 284, 291-292, this Court held that "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." Also, "one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." (Norwell v. Cincinnati (1973) 414 U.S. 14, 16.) It would therefore appear from the foregoing authorities that police who lack sufficient facts to detain a person may not utilize the suspects' exercise of his constitutional right to be left alone free of unreasonable seizure as the predicate for the detention.[11/]

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11. In Commonwealth of Pennsylvania v. Jeffries (1973) 454 Pa. 320, 311 A.2d 914, 917, police observed defendant walking on [fn. cont'd]

Even so, this Court in Sibron v. New York, supra, 392 U.S. 40, 66-67, held that:

> ". . . deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." 12/

However, neither Sibron nor its progeny discuss the counterbalancing policy of not penalizing one for exercising his constitutional right to be free from unwarranted seizures. The court in Au Yi Lau v. United States Immigration & Nat. Serv.

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the street. When Jeffries saw the officers, he attempted to avoid them by running away. The Pennsylvania Supreme Court found that the defendant's quickened pace and flight were not sufficient to justify a Terry stop. (Accord People v. Bower, supra, 24 Cal.3d 638; People v. Menifee (1979) 100 Cal.App.3d 235.)

12. Of course, in the instant case, since the officers had no information relating petitioner or any other member of the group to criminal behavior, even under Sibron the police could not rely on the suspects' flight to justify the detentions.

(Dist. of Columbia Cir. 1971) 445 F.2d 217, 223, has even held that a nonviolent attempt to avoid the police who had no cause to detain a suspect was in itself sufficient cause for a Terry detention:

> "It was this response [defendant's avoidance] to the appearance of the immigration officers which, we think, sufficed to create a reasonable suspicion in the minds of the officers that petitioners might be illegal aliens, and thereby, under the Terry doctrine, warranted the temporary detention of petitioners for interrogation. . . ." (See also United States v. Embery (3rd Cir. 1976) 546 F.2d 552.)

Au Yi Lau and Embery are not only inconsistent with "the principle that a citizen can defy an unconstitutional act [which] is deep[ly rooted] in our system [Citation]," but they are also inconsistent with the spirit of this Court's opinions in Norwell v. Cincinnati and Brown v. Texas, supra. (Wainwright v. Louisiana, supra, 392 U.S. 598, 20 L.Ed.2d at 1331 [Douglas dis.].) In Norwell an officer approached a suspect and asked him if he lived in the neighborhood. The suspect walked away; the officer twice

attempted to stop the suspect, however, the man threw off the officer's arm and protested. The suspect was then arrested for disorderly conduct. In reversing the conviction, this Court stated that, "[s]urely one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." (Id , 414 U.S. at 16.)[13/] In Brown v. Texas, supra, ___ U.S. ___, 61 L.Ed.2d 357, 363, this Court held that petitioner could not be punished for refusing to cooperate with an officer during a Terry detention since "the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct."

Therefore, as in Norwell, Brown, People v. Bower, and Commonwealth of Pennsylvania v. Jeffries, supra, Officers

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13. It would be absurd to hold that one has a constitutional right to verbally abuse an officer who is attempting to effectuate an illegal detention while at the same time holding that a person cannot exercise his constitutional right to be free from an unconstitutional seizure by merely avoiding that confrontation.

Pytel and Holtz should not have been permitted to seize petitioner based upon his attempt to exercise his constitutional right to be free from that unreasonable seizure. If the police can illegally threaten the detention of a citizen and then use the citizen's attempt to avoid that contact as a suspicious circumstance, then the right to be free from unwarranted seizures is meaningless. Therefore, a grant of certiorari and a reversal of the judgment below are required as a matter of constitutional law.

* * * * * *

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant the instant petition for certiorari. This Court's resolution of the question of whether a person may be detained based upon his attempt to avoid an illegal police detention is necessary to resolve conflicts in the law and to give guidance to the lower courts.

Respectfully submitted,

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A P P E N D I X "A"

APPENDIX "A"

Opinion of California Court of Appeal

[2 Crim. No. 35275, Second Dist., Div. One, Mar. 3, 1980.]

THE PEOPLE,
Plaintiff and Respondent,
v.
EDDIE WISE,
Defendant and Appellant.

Defendant appeals from a judgment entered on a plea of guilty to unlawful possession of PCP. He challenges the legality of his detention and the seizure of the contraband. His motion pursuant to section 1538.5, Penal Code was submitted on the transcript of testimony taken at the preliminary hearing.

At 9 p.m. Officers Pytel and Holtz, in uniform and in a marked patrol car, drove to Century Boulevard and 102nd Street where a parking lot was located in an apartment area; they went there because they had received numerous complaints from citizens in the area of narcotic sales and activity in that parking lot and information

from other officers regarding complaints of narcotic activity made to them by citizens in that area, and because they had had personal experience with that particular parking lot having made numerous arrests in the past for narcotics and involvement in numerous narcotic incidents regarding suspects or victims of narcotic transactions.

The officers walked to the parking lot about five apartments from the corner and remained behind a building from which, they could view the entire parking lot in which about 30 or 40 yards away, was a group of 15 or 20 young Negro male adults; a police car pulled into the lot and its high beam lights illuminated the entire lot; most of the people in the group remained there but five or six of them, one of whom was defendant, ran away. From Officer Pytel's own past experience at that parking lot he noticed that usually when one is possessing narcotics for sales in that vicinity and sees a police car or officer he will turn and run in the opposite direction. Defendant ran away from the group and the police car and directly toward the building behind

which Officers Pytel and Holtz were standing when defendant was 20 feet away and facing them the officers stepped out from behind the building; defendant was holding a bottle in his left hand; Officer Pytel said, "Police officers. Halt, put up your hands"; defendant dropped the bottle onto the grass down to his side which landed two or three feet away, and raised his hands. Officer Pytel recovered the bottle which was a brown glass container the contents of which he could see through the glass; it contained Sherman cigarettes and when he opened it a strong odor of PCP emitted from the cigarettes.

Appellant relies on People v. Bower, 24 Cal.3d 638, in challenging the constitutionality of his detention.[1] He asserts that the detention was predicated on "mere hunch" that there might criminal activity,

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1 Inasmuch as on the trial level defendant did not advance the theory of violation of his right to assemble freely or utilize it as a ground for a search and seizure objection, we will not now entertain his contention based thereon and raised here for the first time. (People v. Privitera, 23 Cal.3d 697, 710.)

and that the officers engaged in a "police dragnet" operation the result of which did not constitute probable cause to detain him even though he fled police.

"It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation. [Citations.]" (In re Tony C., 21 Cal.3d 889, 892.) After articulating principles controlling detention, the court in Tony C. continued: "Balancing these factors, the courts have concluded that in order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer

in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question." (P. 893.)

In light of the foregoing standards we examine the actions of Officer Pytel in relationship to the existing circumstances and conduct to determine whether the facts known to him at the time he ordered defendant to halt, which included his specialized training, knowledge and experience (People v. Superior Court (Kiefer), 8 Cal.3d 807, 827) and the specific and articulable facts available to him together with reasonable inferences to be drawn therefrom, were such as to reasonably cause him to believe that some activity relating to crime was occurring and that defendant was involved in that activity. We conclude that defendant was lawfully detained.

In People v. Bower, 24 Cal.3d 638, defendant, a white male, was with several black persons at night in a black residential complex; the group changed its course when it observed the patrol car, then

conversed in a "huddle"; the officers decided either narcotics or weapons were involved due to the hour and a white male being with black persons in a black residential area; when the officers approached, the group disbanded and when defendant exited to the street at a quick walk, the officer told him to stop. The case falls into proper perspective when considered in relation to the narrow issue framed by the court: "This court must decide whether an officer may constitutionally detain a citizen because he is a white man who happens to be with a group of black men in a black residential area at 8:37 p.m." (P. 641.) The court held that these factors were not an adequate basis on which to detain defendant. (P. 649.)

It is important to know what the case at bench is not. It is not a white man in a black residential "high crime" area with black companions at night. It is a young male adult standing with a group of 19 other young male adults at 9 p.m. in a parking lot of an apartment complex who, upon entry to the lot of a police car, ran

with four others from the group which remained standing and away from the police vehicle and out of the light of its high beams across the grass into the darkness in the direction of a building holding a bottle in his left hand, and was stopped by officers who had observed him run from the group and the police car upon its entry to the lot, were aware of prior narcotics sales and activity in that lot from numerous complaints to them and to other officers by citizens in the area and from numerous arrests they personally had made there for narcotics and involvement in numerous incidents regarding suspects or victims of narcotic transactions, and knew from their own personal experience in that lot that usually when one possesses narcotics for sales there and sees a police car or officer, he will turn and run in the opposite direction.

There is no race factor present; they were all black males in a black neighborhood, but neither race nor "one officer's perception of the criminal tendencies of a racial group" (People v. Bower, 24 Cal.

3d 638, 646-647; original emphasis) entered the officer's consideration. There do exist two factors which the court in Bower characterized as "not 'actvity' by a citizen" (p. 645) -- darkness and the character of the area. These two alone are insufficient to warrant the intrusion (In re Tony C., 21 Cal.3d 888, 897), but still they may be pertinent circumstances when other factors are present. (People v. Rosenfeld, 16 Cal. App.3d 619, 622.) Bower warns us that the nighttime factor "should be appraised with caution." (P. 645.) While 9 p.m. is not a late hour it is dark then and whether it is 9 p.m. or 3 a.m., darkness effectively hides criminal activity. Concerning the area, the officers knew the parking lot as one of narcotic sales and activity. Again we are cautioned in Bower in appraising a "high crime area." We note that the term "high crime area" was not used here, the parking lot was never so described and the crime rate had no part in the officer's consideration. However, the character of the area in terms of Officer Pytle's personal familiarity with the activities there

and the nighttime factor combined to provide the environment in which the conduct of defendant must be judged.

The lack of "furtive behavior" or the "innocent gesture" was also discussed in Bower; the court found "little that is 'furtive'" about defendant's behavior (p. 647) -- four or five persons in animated conversation left the apartment building each leaving to go in a different direction; nothing was concealed, disposed of, exchanged or carried; when they separated they walked away on public sidewalks with no attempt to avoid the lighted open portions of the area. The key seems to be that the underlying facts must reasonably distinguish the suspect from any other citizen at "that time and place." (People v. Moore, 69 Cal.2d 674, 683), thus the activity must be appraised in relation to the environment, time and place in which it occurred. (People v. Moore, 69 Cal.2d 674, 683; Flores v. Superior Court, 17 Cal.App. 3d 219, 223.) Considered in this light, defendant's actions were not exactly normal and in no way approached the innocence of

the mere act of turning one's back to a police officer while talking into the telephone in a telephone booth as in People v. Moore, 69 Cal.2d 674, 683. Upon seeing the police car, defendant and four others ran in the same direction away from the vehicle out of the light across the grass toward a darkened building. Significant is the fact that the other 15 members of the group remained where they were illuminated by the high beams of the police car. This flight from the police is to be judged in the environment in which the activity took place. (Flores v. Superior Court, 17 Cal.App.3d 219, 223.) To the trained officer knowing the character of that parking lot and that usually one possessing narcotics for sale there will run from police, such flight from the police vehicle amounted to even more than a "furtive gesture"; plainly, it took on all the characteristics of an attempt by one in

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possession of narcotics to escape confrontation with a police officer.[2]

Appellant's contention that seizure of the bottle was unlawful is based on the dual premise that he did not abandon it and his interest in the contents and in any case his discarding the bottle was the product of an illegal detention; and that the search of the bottle cannot be justified as a plain view seizure. In light of our conclusion concerning the first premise, we do not reach the second.

Appellant introduces an element of fear of danger of being shot by police "in light of the increasing number of police shootings of detained suspects," and argues that dropping the bottle was to assure police it was not a weapon. This police shooting theory fails to support any such fear factor. He

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2 It could be argued that when Officer Pytel saw defendant running toward him before he ordered him to halt he saw the bottle in his hand. There is some confusion in the record on this point. However, in the absence of a showing Officer Pytel relied on this added circumstance, we consider this no further.

is precluded from raising the issue here for the first time. (People v. Privitera, 23 Cal.3d 697, 710; People v. Rogers, 21 Cal.3d 542, 547-548.) The same may be said for his argument that there was no testimony regarding the contraband nature of the bottle or Officer Pytel's expertise in recognizing its contents as contraband. Although the superior court commented that defendant dropped the bottle in plain sight upon being ordered to stop, it is clear that in denying his motion the superior court accepted the theory of abandonment: "They ordered him to stop and he drops the bottle in plain sight. Investigating it they found it contained contraband. I think is is a valid stop. Of course, there was, in fact, no search once you get by that."[3] (Emphasis added.) This is a

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3. At the preliminary hearing defense counsel argued that by dropping the bottle defendant did not abandon it; the prosecutor said it constituted abandonment. The motion in superior court was submitted on the transcript of testimony taken at the preliminary hearing without argument. We can assume that the superior court decided the motion primarily on the issue framed by defendant himself at the preliminary hearing.

holding that defendant had abandoned the bottle at the commencement of a legal detention, and that seizure and examination of the bottle by police were not the result of any search. Finally, there is no evidence that Officer Pytel threatened to conduct an illegal search. When he told defendant to halt and raise his hands he did not tell or even intimate to him he was going to search him (People v. Robinson, 58 Cal.App. 3d 363, 366), he made no threats of any kind and committed no act evidencing his intent to attempt, by coercion or threat, a non-consensual search. (In re Michael V., 10 Cal.3d 676, 682.) Thus, this theory was not presented in the court below. Under the circumstances, it is reasonable to believe the officer ordered defendant to raise his hands as a proper precaution for his own safety.

On the state of the record here, plainly the issue is not whether the seizure of the bottle was the product of an illegal search, but whether it was the product of an illegal detention for if the bottle was abandoned by defendant at the outset of legal police

conduct and detention it was proper for the officers to seize and examine it. We have hereinabove concluded that defendant's detention was a lawful one and that there was no illegal police conduct. It is readily inferable from the evidence that defendant dropped the bottle from his hand either immediately before or at the time he raised his hands to dispossess himself of its contraband contents. Thus we also conclude that the defendant's dropping the bottle from his hand to the grass was an abandonment of the bottle and the contraband it contained, they were not the subject of any "search," there was no intrusion into defendant's right of privacy and they were legally acquired by the police. (People v. Stafford, 28 Cal.App.3d 405, 410; People v. Orr, 26 Cal.App.3d 849, 860; People v. Rosenfeld, 16 Cal.App.3d 619, 623; People v. Poehner, 16 Cal.App.3d 481, 485-486; People v. Harris, 15 Cal.App.3d 498, 501.

Appellant's remaining contention is that he is entitled to good time/work time credits for presentence custody against his

sentence. Whether a convicted felon is entitled to good time and work time credit for time served in the county jail prior to sentencing is a question which our Supreme Court has answered in the affirmative. (People v. Sage (Feb. 19, 1980, Cr. 20997) ___ Cal.3d ___.) Presumably appellant will receive the benefit thereof administratively. (See fn. 7, p. 14 slip opinion.) If not he may resort to judicial relief by way of motion to be given such credit in the trial court.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

LILLIE, Acting P.J.

I concur:

HANSON, J.

I dissent.

The propriety of Officer Pytel's initial detention of appellant presents an exceedingly close case.

It seems to me that the question boils down to whether the police officer reasonably could believe that appellant was connected to some activity relating to crime (People v. Bower (1979) 24 Cal.3d 638, 644; In re Tony C. (1978) 21 Cal.3d 888, 892-893), and could point to "specific and articulable facts" (ibid.) to support that belief. Here there were two sets of facts: (a) the officers were at the location because they received numerous complaints from citizens about narcotics sales and activity in the parking lot and had made numerous arrests for narcotics activity at that precise location; and (b) defendant, when a police car came into sight, ran away from it toward the hidden witness-officer. Fact (a) is more than the mere "high crime area" rationalization rejected in Bower (24 Cal.3d at p. 645). The citizen complaint and the prior arrests related to

specified crime (on-going narcotic activity) in a specified place (the parking lot). Fact (b) is more than mere avoidance of officers by a citizen not desiring the pleasure of their company. (Bower, supra, 24 Cal.3d at pp. 647-648.) It is flight -- a fact which, if proved -- the jury might consider in deciding guilt or innocence. (Pen. Code, § 1127c.) As such, it likewise is a specific and articulable fact. While there is some logic in the appellant's argument that the validity of a detention should not depend on the speed with which a party moves away from approaching police officers (in Bower, supra, for instance, the appellant had moved at a "very quick walk, almost a run" (24 Cal. 3d at p. 643)), it simply is not unreasonable, and therefore, is not within the constitutional prohibition, to use the fact of a dead run as one of the facts supporting a decision to detain. Accordingly, I concur in the majority's conclusion that the detention -- the stop itself -- was valid.

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I cannot agree, however, that the search of the bottle was justified on the theory of abandonment. The record shows that, as appellant ran from the police car, Officer Pytel and his partner, Officer Holtz, both in uniform, stepped from behind a building when appellant was twenty feet away, and said "Police officers. Halt, put up your hands." At that moment defendant dropped the bottle and put his hands in the air. The officers retrieved and opened the bottle and were then able to smell the odor of PCP coming from the cigarettes.

The bottle dropping occurred almost instantly after the police command as appellant complied with the order to raise his hands. It is manifest that the bottle was dropped in response to that order. It is not reasonable, in my view, to read into that response and intent to give up all interest in the bottle, and hence any right to object based on privacy. Thus, cases in which a defendant discarded contraband while being pursued by police officers (e.g., People v. Prendez (1971) 15 Cal. App.3d 486) or when approached by officers

(e.g. Hester v. United States (1924) 265 U.S. 57, 58) are not in point.

It is clear on this record that the PCP was not identified until the bottle was opened and the contents were smelled by the officers. If appellant retained a privacy interest in the contents of the bottle further questioning to the extent permitted during a detention (see e.g., People v. Manis (1969) 268 Cal.App.2d 653) should have occurred to determine if, under any theory, there was a right to open the bottle without the benefit of a search warrant. The only theory upon which to begin to construct an argument would be that the contents of the bottle were in plain view and reasonably suspected to contain contraband. The majority opinion states that Officer Pytel could see the contents of the bottle through the glass, that it contained Sherman cigarettes and that when the bottle was opened a strong odor of PCP emitted from the cigarettes.

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Assuming that this is so,[1] in the absence of any testimony concerning the officer's experience or expertise (Wimberly v. Superior Court (1976) 16 Cal.3d 557, 563-565), the securing of the bottle while a search warrant was procured (see People v. Dalton (1979) 24 Cal.3d 850) would have been proper, but opening it was not. (Ibid.) (Compare People v. Lilienthal (1978) 22 Cal. 3d 891, 899.)

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1 It is not disputed that the odor was not smelled until the bottle was opened. It is not quite so clear from the reporter's transcript, as I read it, that Officer Pytel saw the contents through the glass. On direct examination, he testified simply that the bottle was "[a] brown coffee-mate type container, containing Sherman Cigarettes, which emitted the odor of [PCP] . . ." and that after he "made this observation of the bottle" appellant was taken into custody. On cross-examination, he testified that when he retrieved the bottle he opened it up and then was able to smell the odor, and he noted that the bottle had

[Footnote omitted]

Accordingly, I must dissent from the judgment of affirmance.

COLE, J.*

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a label on it covering most of the bottle and was of dark brown glass. On redirect examination, the officer testified that you can see the contents of the bottle through the glass by holding it up. But nowhere did the officer testify that he did in fact hold the bottle up to see the contents, before he opened it. This court has called for the bottle and inspected it, inside of a glassine envelope. The bottle is an ordinary small size Coffee-Mate container whose wrapper completely surrounds the glass surface except for a small space at the top and the bottom. Holding the bottle up to the light the outlines of what apparently are cigarettes can be seen.

*Assigned by the Chairperson of the Judicial Council.

A P P E N D I X "B"

[ORDER OF SUPREME COURT OF CALIFORNIA DENYING HEARING]

[CAPTION OMITTED]

May 2, 1980.

Appellant's Petition for Hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled cause filed March 3, 1980 which appears at 103 Cal. App.3d 9. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

Clark, J., is of the view that the opinion should remain published.

BIRD
Chief Justice